



NO. 323

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

CIVIL CASE NO. 300 OF 2010

ISAAC ONGERA
NYATUKA.....PLAINTIFF

-VERSUS-

PAMELA KWAMBOKA
ARITA.....DEFENDANT

RULING

According to the plaintiff, he is the registered proprietor of the parcel of land known as **Kisii Municipality/Block/655**, the “suit premises” pursuant to a certificate of leave issued to him on 11th October, 2006. Since the plaintiff has enjoyed possession, use and occupation of the suit premises without interference and or interruption from anybody. However sometimes in late September, 2010 the defendant, her agents or employees trespassed and or encroached onto the suit premises, pulled down a fence separating the suit premises and that of the defendant and fenced off the whole suit premises together with the defendant’s giving an impression that it was one, continuous parcel of land. Soon thereafter the defendant started heaping building material on the suit premises in readiness to put permanent structures therein. Thus the defendant’s trespass is permanent and has had the effect of denying the plaintiff access to his suit premises and thus stands to suffer irreparable loss. The actions of the defendant aforesaid compelled the plaintiff to lodge this suit for permanent injunction directed at the defendant to vacate to the suit premises or in default be forcefully evicted and after such eviction he be restrained from trespassing onto or in any way whatsoever interfering with the plaintiff’s use, possession and occupation of the suit premises.

Contemppreneously with the filing of the suit, the plaintiff took out a chamber summons application

under certificate of urgency pursuant to Order XXXIX rules 1 and 2 of the Civil Procedure rules and sections 3,3A and 63(e) of the Civil Procedure Act. In the main he sought that pending the hearing and determination of this suit the defendant be restrained from further trespassing on to, interfering with in anyway whatsoever or carrying out any activities on the suit premises. He also prayed for costs. The grounds on support of the application are captured in the history of the dispute that I have outlined above. Suffice to add that by dint of section 27 and 28 of the Registered Land Act, the plaintiff is the absolute registered leaseholder of the suit premises, the defendants' invasion of it and or trespass is legally inexcusable and unlawful. By virtue of the foregoing the plaintiff had established a prima facie case with high chances of success. Finally, he contended that the Constitution of Kenya provides for protection from interference with use of one's property which is legally acquired.

The affidavit in support of the application is similarly a rehash of the history of the dispute aforesaid. The only addition being that he feared that if he was to re-enter the suit premises without an order of this court, the agents, servants or employees of the defendant may repulse him violently and blood may be shed. Similarly as the registered leaseholder of the suit premises and the fact that the defendant has no ownership rights though he has obstructed his entry into and use of the said premises, he stood to suffer irreparably . An award of damages would not recompensate the loss he would suffer.

The defendant's defence to the plaintiff's claim is first and foremost that she is a stranger to the plaintiff's allegations. She denied that the plaintiff was ever issued with a certificate of lease in respect of the suit premises. He could not have been registered and issued with a certificate of lease in respect of the suit premises in the year, 2006 as already the suit premises had been allocated, alienated and registered in the name of the defendant on 31st December, 2004. She therefore denied the allegation of trespass and maintained that she took possession of the suit premises in the year 1998 upon being allocated and alienated in her favour vide a letter of allotment dated 1st July, 1998 and has remained in actual possession and occupation thereof. The orders sought, cannot therefore issue at the instance of the plaintiff.

The replying affidavit sworn by the defendant in response to the application for interim injunction was along the same lines as the defence aforesaid. The only addition being that the plaintiff's had never taken possession of the suit premises, though issued with an allotment letter, the plaintiff did not comply with the conditions set out therein, some of the documents exhibited in the plaintiff's supporting affidavit were forgeries and finally that the plaintiff did not have any certificate of lease in respect of the suit premises to warrant a claim of ownership whatsoever and or howsoever. Consequently, the plaintiff had no legal and equitable interest in the suit premises. That being the case, the plaintiff did not have any prima facie case in respect of the suit premises. To the extent that he was not the owner of the suit premises he was non-suited and could not suffer any conceivable loss whatsoever.

Why the application came up for hearing interpartes on 15th November, 2010 the plaintiff sought and was granted leave to file a further affidavit. In this further affidavit, the plaintiff was able to exhibit the certificate of lease dated 11th October, 2006 issued in his name. That he is recognized by the municipal council of Kisi as the leaseholder since on 1st march, 2010 the council issued him with a demand letter under the v.....Act demanding outstanding rates. He also conducted a search at the council offices and ascertained that he was the recognized leaseholder of the suit premises. He also claimed that the documents in the possession of the Defendant could have been forged.

The application was canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered alongside cited authorities.

The principles for granting an interlocutory injunction such as sought in the instant application are that:-

- a) *The applicant must show a prima facie case with a probability of success.*
- b) *An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages.*
- c) *If the court is in doubt, it will decide on application on balance of convenience.*

A prima facie case in a civil application include but is not confined to a genuine and arguable case. It is a case which on the material presented to the court aproperty directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for explanation or rebuttal form the latter. Finally in granting an injunction court exercises discretion. An injunction too is an equitable remedy. So that whoever seeks it must come to the court of equity with clean hand and must show utmost good faith. See **Mrao Ltd .v. First American Bank of Kenya Ltd (2003) KLR,125.**

Applying all the above considerations to the circumstances of this case that on the material placed before me the plaintiff has been able to establish a prima facie case with a probability of success. It is common ground that both the plaintiff and defendant have leasehold certificates to the suit premises. T he one issued to the plaintiff was dated 11th October, 2006 whereas that of the defendant is dated 31st December, 2004. Both those leasehold certificates were issued to the parties herein pursuant to the letters of allotment dated 5th January, and 18th July, 1998 respectively. As to which of the two certificates of lease should be preferred by the court will be a matter of evidence at the full hearing of the case. It cannot therefore be said that the certificate of lease issued to the defendant is superior to the issued to the plaintiff. Unless and until the certificate of lease issued to the plaintiff is recalled and cancelled, he is conferred or bestowed just like the defendant with absolute and exclusive rights to the same by virtue of sections 27 and 28 of the Registered land Act. It is instructive that the defendant has not seriously denied the fact that he entered the suit premises sometimes in September, 2010 pulled down the plaintiff's hence at the place where the suit premises shares a common boundary with the defendant's plot and fenced off the suit premises together with his to give an impression of one continuous plot. It appears to me that the parties herein are neighbours. Prior to September, 2010 they were occupying their separate plots. I think that the situation obtaining prior to September 2010 on the ground should be maintained until the hearing and final determination of this suit.

It is also common ground that each party is claiming that the documents in the possession to each other with regard to the suit premises are forged. Again this is not a matter which can be determined on an interlocutory application such as this. It will require the evidence of an expert to certify the documents that are forgeries. Until then this court can only treat the documents as genuine. It is the plaintiff who has come to court seeking an injunction on the basis of the documents in his possession with regard to the suit premises. On the basis of the same, one cannot say that he has not established a prima facie case in terms of **Mrao** (supra).

The plaintiff has averred in his affidavit that his property has over the years remained fenced. Sometimes in late September, 2010, the defendant pulled down the fence separating the suit premises from that of his plot and he fenced the suit premises and his forming one continuous plot. Since then the plaintiff has been denied access. There is also evidence that the defendant is intent on developing the suit premises, that being the case, I am satisfied that the plaintiff will suffer irreparable loss which an award of damages will not suffice. In short there is ample and demonstrable evidence of irreparable loss that the plaintiff will suffer unless the injunction is granted.

From the plaintiff's affidavit, it is apparent that the plaintiff and defendant are neighbours. Until the September 2010, the plaintiff was in occupation of the suit premises having fenced it off. The defendant on the other hand occupied the adjoining plot. I do not think that any harm or prejudice will come in the way of the defendant if that scenario was to be maintained until the hearing and final determination of this suit. The balance of convenience therefore tilts in favour of the plaintiff continuing in occupation and possession of the suit premises and the defendant being restrained from that portion. In doing so, I do not think that the court will in effect be granting final orders at an interlocutory stage as submitted by the defendant.

In the result I allow the application in terms of prayers 3 and 4.

Ruling dated, signed and delivered at Kisii this 17th day of January, 2011.

ASIKE-MAKHANDIA

JUDGE